

Nos. 25-3030, 25-3034, 25-3293

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

American Federation of Government
Employees, AFL-CIO, *et al.*,
Plaintiffs-Appellees,
v.

Donald J. Trump, *in his official capacity as
President of the United States, et al.,*
Defendants-Appellants.

Nos. 25-3030, 25-3293

On Appeal from the U.S. District
Court for the Northern District of
California

D.C. No. 3:25-cv-03698-SI

*In re Donald J. Trump, in his official capacity
as President of the United States, et al.,*
Petitioners-Defendants.

No. 25-3034

On Petition for Writ of
Mandamus to the U.S. District
Court for the Northern District of
California

D.C. No. 3:25-cv-03698-SI

**SUPPLEMENTAL ADDENDUM TO OPPOSITION TO SUPPLEMENTAL
EMERGENCY MOTION FOR STAY PENDING APPEAL / PETITION FOR
WRIT OF MANDAMUS**

Elena Goldstein
Skye Perryman
Tsuki Hoshijima
DEMOCRACY FORWARD
FOUNDATION
P.O. Box 34553
Washington, D.C. 20043
Tel.: (202) 448-9090
egoldstein@democracyforward.org
sperryman@democracyforward.org

Stacey M. Leyton
Barbara J. Chisholm
Danielle E. Leonard
ALTSHULER BERZON LLP
177 Post St., Suite 300
San Francisco, CA 94108
Tel.: (415) 421-7151
sleyton@altber.com
dleonard@altber.com

*Attorneys for Plaintiffs-Appellees/Real Parties in Interest**

**Additional counsel and affiliations on signature pages of opposition brief*

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Susan Illston, Judge

AMERICAN FEDERATION OF)	
GOVERNMENT EMPLOYEES, AFL-CIO,)	
et al.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. 3:25-CV-03698-SI
)	
PRESIDENT DONALD J. TRUMP, in)	
his official capacity as)	
President of the United)	
States, et al.,)	
)	
Defendants.)	
)	

San Francisco, California
Thursday, May 22, 2025

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

For Plaintiffs:

ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, California 94108

BY: DANIELLE E. LEONARD, ATTORNEY AT LAW
STACEY M. LEYTON, ATTORNEY AT LAW
CORINNE F. JOHNSON, ATTORNEY AT LAW
BARBARA J. CHISHOLM, ATTORNEY AT LAW

DEMOCRACY FORWARD FOUNDATION
PO Box 34553
Washington, D.C. 20043

BY: TSUKI HOSHIJIMA, ATTORNEY AT LAW

(APPEARANCES CONTINUED ON FOLLOWING PAGE)

Reported By: Ana M. Dub, RDR, CRR, CCRR, CRG, CCG
CSR No. 7445, Official United States Reporter

APPEARANCES : (CONTINUED)

For Plaintiffs:

OFFICE OF THE CITY ATTORNEY
Sixth Floor - Fox Plaza
1390 Market Street
San Francisco, California 94102
ALEXANDER J. HOLTZMAN, ATTORNEY AT LAW

BY: ALEXANDER J. HOLTZMAN, ATTORNEY AT LAW

OFFICE OF THE COUNTY COUNSEL
70 West Hedding Street
East Wing - Ninth Floor
San Jose, California 95110

BY: RAPHAEL N. RAJENDRA, ATTORNEY AT LAW

KING COUNTY EXECUTIVE
401 5th Avenue - Suite 800
Seattle, Washington 98104

BY: ALISON C. HOLCOMB, ATTORNEY AT LAW

For Defendants:

DEPARTMENT OF JUSTICE
Civil Division
950 Pennsylvania Avenue NW
Washington, D.C. 20530

BY: EMILY M. HALL
DEPUTY ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
20 Massachusetts Avenue NW
Washington, D.C. 20530

**BY: ANDREW M. BERNIE
DEPUTY ASSISTANT ATTORNEY GENERAL**

1 Thursday - May 22, 2025

10:42 a.m.

2 P R O C E E D I N G S

3 ---o0o---

4 **THE COURTROOM DEPUTY:** Audience and counsel, this is
5 just another reminder that these proceedings are being recorded
6 and streamed on Zoom. Any additional recording is strictly
7 prohibited.

8 Now calling Civil Matter 25-cv-3698, American Federation
9 of Government Employees, AFL-CIO, et al., versus Trump, et al.

10 Counsel, please approach the podium and state your
11 appearances for the record, starting with the plaintiffs.

12 **MS. LEONARD:** Good morning, Your Honor. Danielle
13 Leonard from Altshuler Berzon.

14 Here with me at counsel table are Corinne Johnson, Stacey
15 Leyton, and B.J. Chisholm from Altshuler Berzon, and Tsuki
16 Hoshijima from Democracy Forward, as well as Ravi Rajendra from
17 the County of Santa Clara, and Alex Holtzman from the City and
18 County of San Francisco.

19 **THE COURT:** Good morning.

20 **MR. BERNIE:** Good morning, Your Honor. Andrew Bernie
21 from the Department of Justice on behalf of defendants. With
22 me at counsel table is Emily Hall, also from the
23 Department of Justice.

24 **THE COURT:** Good morning.

25 **MR. BERNIE:** Good morning.

1 **THE COURT:** We are here today to determine whether I
2 should convert the two-week temporary restraining order that I
3 issued almost two weeks ago into a permanent injunction -- a
4 preliminary injunction for the balance of the case; that would
5 be to continue the status quo until the case can be determined.

6 I appreciate what I believe to be the defendants' prompt
7 response to the order as it stood from what I understand, and
8 I'm grateful for that.

9 The preliminary injunction motion filed by plaintiffs
10 requested it continue -- that the TRO continue, and some
11 additional conditions are requested.

12 So I thought I would tell you what I'm thinking first, and
13 then you can discuss the matter with me. We have had so much
14 briefing, though, that I do have some questions I'll put to you
15 first, and that would help me.

16 It is -- it is the case that presidents -- elections have
17 consequences. Presidents can set policy priorities for the
18 executive branch, and agency heads may implement them; nobody
19 disputes that. But Congress creates the federal agencies,
20 funds them, and gives them duties that, by statute, they must
21 carry out.

22 At this stage of the case, the legal history seems clear.
23 A president may not initiate a large-scale executive branch
24 reorganization without partnering with Congress. To hold
25 otherwise would be telling 9 presidents and 21 congresses that

1 they misunderstood the Constitution. I do not have that level
2 of self-confidence.

3 And agencies may not conduct large-scale reorganizations
4 and reductions in force in blatant disregard of Congress's
5 mandates whether the President orders them to or not.

6 The role of the district court is to examine the facts and
7 apply the law to the facts. And given the number of agencies
8 named in the lawsuit, the scope of the -- the evidentiary scope
9 of this case is very large.

10 By their own admission, defendants have opted not to rely
11 on any factual representations in their oppositions. On the
12 other side, plaintiffs have provided about 1,500 pages of
13 evidentiary support.

14 The defendants did provide several agency plans for
15 *in camera* review, which I appreciate. The contents of those
16 plans does not dramatically change the Court's previous
17 understanding of this case; and since defendants maintain that
18 they are privileged, I won't be revealing any details in the
19 discussions that we have here in open court today.

20 However, overall, I do believe the evidence before
21 the Court suggests that plaintiffs will likely succeed on the
22 merits of their claims that the President, the Office of
23 Management and Budget, the Office of Personnel Management, and
24 DOGE have exceeded their authority by directing large-scale
25 reductions in force and reorganizations.

1 I believe injunctive relief, preliminary at this stage,
2 remains necessary to preserve the status quo and protect the
3 power of the legislative branch. So I'm inclined to continue
4 the prospective relief with some refinement.

5 I've also considered, because plaintiffs have requested
6 it, retrospective relief. And we can talk about that later.

7 What I'm considering doing is granting the retrospective
8 relief, but staying it at this time. I'm concerned about the
9 effect of all of this litigation on the lives of the people who
10 are being affected, and being hired and rehired and furloughed;
11 and I think we need to preserve as much order as we can for
12 those -- for those people.

13 I want to emphasize that we're still at a very preliminary
14 stage of this case. Upon receiving a fuller evidentiary
15 record, my conclusions may change, but the evidence before
16 the Court today strongly suggests that the recent actions of
17 the executive branch usurp the constitutional powers of
18 Congress.

19 So that's my thinking. And what I would like to do before
20 we get into any general argument is, I have a couple of
21 questions for you.

22 The first question I have is for the Government. You have
23 asked that the Court limit any relief to the named parties.
24 And the TRO limited relief to the -- just to the named
25 defendants, but I don't know how you would limit it to the

1 plaintiffs.

2 So that's my first question to you is: How would you
3 envision I limit relief to the named parties in some different
4 way from what I've done?

5 **MR. BERNIE:** Well, Your Honor, in terms of the scope
6 of the injunction, the belief that a nationwide injunction
7 shouldn't issue, I think -- we think the Court should limit the
8 injunction to any individual plaintiffs that the Court finds
9 have standing in irreparable harm, perhaps members of the
10 plaintiffs' union.

11 We acknowledge that it would be administratively --
12 I think we acknowledge that it would be administratively
13 difficult to -- to -- for the Government to comply with the
14 injunction just as to named parties.

15 But we would rely on, I think, Chief Judge Sutton's
16 opinion for the Sixth Circuit that says that that is -- that
17 that's a concern for the Government in terms of compliance; and
18 if the Government chooses to -- chooses -- determines that the
19 only administratively workable solution is to -- is to
20 effectively provide the relief nationwide, that that's
21 the Government's choice; but that as a general matter,
22 the Court should limit its injunction to any named parties who
23 have standing and have demonstrated entitlement to injunctive
24 relief rather than issue a nationwide injunction. But --

25 **THE COURT:** But how would that work? I mean, how

1 would I say that? How would I say it's only the plaintiffs?

2 **MR. BERNIE:** I think -- I think -- I think
3 the Court -- I think the Court could limit it to any -- to any
4 individual members of the plaintiffs' union who have shown that
5 they have standing that they're in imminent risk of being
6 RIF'd.

7 And some of this gets into the substance of the
8 injunction. As the Court is aware, we think that any
9 injunction should not enjoin preparatory steps and stuff like
10 that. I mean, that's a slightly related issue.

11 But as a general matter, we think the Court should limit
12 it to any parties. And that, again, the Government might
13 choose -- might choose to determine that the only
14 administratively workable solution is to provide it to
15 everyone. But as Chief Judge Sutton said in his opinion for
16 the Sixth Circuit, that's ultimately a compliance decision for
17 the Government.

18 **THE COURT:** Well, but you haven't said how I could do
19 it, how I could do it in the English language, to say this
20 order, if I find, is likely to be found to be unconstitutional
21 and can't be implemented with respect to the agencies who are
22 defendants in this case.

23 **MR. BERNIE:** Right. I think -- I think an injunction
24 would say the agencies are -- obviously -- you're asking about
25 the scope of the injunction. Obviously, we don't agree that

1 injunction is appropriate, but I -- we're not talking about
2 that now; I understand.

3 But I think it would be limited to any individuals --
4 you know, members of -- members of the plaintiffs' -- of the
5 plaintiff -- members of the plaintiff unions.

6 **THE COURT:** Okay. Well, I hear what you've said. I'm
7 not sure that that's possible, but I hear what you've said.

8 **MR. BERNIE:** Fair enough. Did you want me to stay at
9 the podium, or should I --

10 **THE COURT:** Oh, you may, sure.

11 **MR. BERNIE:** Okay.

12 **THE COURT:** I have a couple more questions.

13 **MR. BERNIE:** Okay.

14 **THE COURT:** So the next one is this: From your
15 paper -- from the papers that you've submitted, it appears that
16 the individual federal agencies would be permitted to submit an
17 ARRP that calls for no RIFs?

18 **MR. BERNIE:** I'm sorry, Your Honor?

19 **THE COURT:** Well, you've indicated that these are
20 guidances and encouragements to the agencies but that the
21 agencies are making their own decisions on the RIFs.

22 So if an agency decided that it needed its employees and
23 couldn't really afford to cut them --

24 **MR. BERNIE:** Sure.

25 **THE COURT:** -- could it say so in its ARRP and

1 presents that to OMB?

2 **MR. BERNIE:** I mean -- so I think so, Your Honor. If
3 the agency determined that its -- that all of its functions
4 were statutorily required and it couldn't -- and it couldn't
5 implement the executive order consistent with applicable law
6 and the other principles, I think it could -- it could do that.
7 I'm not sure.

8 Our point for the ARRPs is -- and the workforce memorandum
9 and the executive order itself, is the executive order is
10 mandatory; we've never claimed otherwise. But the executive
11 order leaves the agencies with very broad authority to look at
12 their own organic statutes and own authorities, including the
13 RIF statute and RIF regulation, determine what the law
14 requires, and make determinations using their lawful authority
15 that are consistent with the President's policy priorities as
16 set forth in the executive order.

17 I don't want to make any representations that any
18 individuals -- that any agency are or are not recommending no
19 RIFs; but if the agency determined that it could not -- it
20 could not engage in any RIFs consistent with applicable law,
21 the executive order directs them to follow the law.

22 **THE COURT:** Well, didn't we have one example where
23 that's what the agency said and OMB and OPM said, "Well, that
24 just won't do"?

25 **MR. BERNIE:** So, Your Honor --

1 **THE COURT:** "Try again"?

2 **MR. BERNIE:** So, Your Honor, my -- so my
3 understanding -- and I want to make sure I'm careful about the
4 representations for the Court.

5 Our position in this case from the beginning -- and I
6 understand the Court's concerned about the record evidence.
7 But our concern in this case from the very beginning is that
8 this is a global challenge to an executive order and workforce
9 memorandum. It's not a challenge to individual agency actions.
10 So we have not -- we don't think -- we think the question is
11 what the executive order says on its face.

12 But I can try to answer the Court's question as best as I
13 can, even though our client hasn't relied on it.

14 My understanding is that OMB and OPM, notwithstanding the
15 review and approval function set forth in the memorandum, do
16 not understand their role to be approving, vetoing, or formally
17 signing off on ARRPs, and certainly not second-guessing the
18 substantive determinations agencies make about how to implement
19 the executive order consistent with their own statutory
20 authorities.

21 So I don't think it's correct that OMB and OPM are
22 rejecting ARRPs or directing RIFs that agencies don't make.
23 But we have -- but as the Court acknowledged in -- in its
24 opening presentation, and correct, we have not relied on
25 factual representations in this case. I understand the Court

1 may disagree, but we don't -- we think, in a global challenge
2 to the executive order in particular, what matters is what the
3 executive order says.

4 That's consistent, I think, with the Ninth Circuit's
5 decision in *San Francisco vs. Trump* -- which I think is the
6 most relevant precedent before this Court -- which we think,
7 even though the Court in that case disagreed with the
8 substantive determination the executive made, is actually quite
9 helpful to our position because it's exactly the type of
10 inquiry we think the Court should be suggesting.

11 But we -- we haven't really made any factual
12 representations, but that's my understanding of what OMB and
13 OPM understand their -- their role to be.

14 Hopefully, that's responsive to the Court's question.

15 **THE COURT:** Well, I wonder if you could just say that
16 again, because that was my next question, which is: What is
17 the role of OPM and OMB in approving and/or disapproving ARRPs?

18 **MR. BERNIE:** So my understanding -- and, again, I want
19 to caveat this. This hasn't been a significant part of my
20 case. And, obviously, the federal government is obviously very
21 large. There are hundreds of agencies. So I don't want to
22 make representations about everything.

23 But my understanding is what OMB -- OMB and OPM do not
24 view their role -- and I think we've said this in
25 declarations -- as signing off on ARRPs. Agencies can begin

1 ARRP implementation without receiving OMB and OPM's approval.

2 You know, I mean, I think as a practical matter, if an
3 agency submitted -- there's -- I think there's perhaps some
4 back-and-forth if an agency submits an ARRP that doesn't have
5 certain things, that -- that doesn't address certain topics
6 that OMB and OPM have directed that agencies should address in
7 considering how to implement the executive order.

8 But, you know, again, this hasn't been part of our
9 presentation -- case. So I want to be careful with what I say.
10 But I don't think -- I don't think that OMB and OPM view their
11 role as substantively second-guessing agencies' determinations.

12 The whole process set forth by the workforce memorandum is
13 a process consistent with, you know, OPM's role as the
14 centralizing force for the federal government on personnel
15 matters and OMB's role as the centralizing force for budget
16 matters, to give the agencies guidance. They have this
17 executive order which -- which, you know, like many executive
18 orders on this subject, is vague and raises questions about
19 agency compliance and gives agencies a framework for how to
20 determine how they should implement the executive order.

21 And the workforce memorandum makes clear repeatedly that
22 agencies should examine their own statutory authorities and
23 determine what's lawful; that they should -- if any -- if they
24 should determine what congressional engagement is necessary;
25 that if any processes require notice and comment rulemaking,

1 that they will need to engage in that rulemaking.

2 **THE COURT:** And they should do all of that within the,
3 like, three weeks that they were given to prepare their ARRPs?

4 **MR. BERNIE:** No, no, not necessarily, Your Honor.

5 So that is a timeline for submitting the ARRPs, which are
6 agency planning documents; but as we have said -- as we have
7 said, I think, in public filings, the agencies -- agencies are
8 not obligated to take all of the steps set forth in the ARRPs.
9 ARRPs are subjects to change.

10 If there are particular steps, like, you know, the most
11 obvious example would be -- would be the notice period set
12 forth by statute in OPM regulations for providing notice for
13 employees who are subject to a reduction in force, the agencies
14 have to -- the agencies have to follow that -- follow that; and
15 nothing in the workforce executive order or the workforce
16 memorandum says otherwise.

17 **THE COURT:** Same kind of question. The memo, based on
18 the executive order, requires that the agencies certify that
19 the ARRPs will have a positive effect on the delivery of direct
20 services when direct services are at issue.

21 Have any such certifications been issued?

22 **MR. BERNIE:** I'm -- I'm not sure. But I meant
23 to bring -- I meant to bring that up to the -- to the lectern
24 with me.

25 **THE COURT:** Oh, you may, sure.

1 **MR. BERNIE:** Would the Court mind if I --

2 **THE COURT:** Go get it.

3 **MR. BERNIE:** Thank you.

4 So I think -- I think certain -- certain -- I think as
5 part of the workforce memorandum, that the -- the workforce
6 memorandum directs agencies to state whether they provide
7 direct services to citizens -- some agencies do and some
8 don't -- and say which direct services are they and then
9 certify that it will not have a negative effect.

10 I think it directs -- and, again, I'm reluctant to get
11 into privileged material that particular ARRPs direct, but
12 I think that -- I think that the workforce memorandum directs
13 that to be provided as part of Phase 2 ARRPs.

14 And so my understanding is that the Phase 2 ARRPs can
15 include that, if the workforce --

16 **THE COURT:** Well, that was as of April 14th, I think.

17 **MR. BERNIE:** Correct. Yeah. The agencies should
18 submit the Phase 2 ARRPs for review and -- for review and
19 approval no later than April 14th. But, again -- and they
20 should have that certification. And, again, these are
21 provisional planning documents.

22 And I guess -- I guess the one thing -- the one thing I
23 would say, Your Honor, is I can certainly appreciate
24 the Court's -- the Court's concern that perhaps the workforce
25 memorandum directs agencies to act under -- under expedited or

1 unreasonable time frames. I can -- I can understand
2 the Court's concern.

3 I think a lot of that is ameliorated by the fact that
4 these are just planning documents that outline steps in the
5 future. The agency doesn't have to take them.

6 But if -- and I understand the Court has laid out its
7 views and it's considered voluminous briefing.

8 But the one thing, if I can get sort of one thing across
9 this morning, it -- it would be this, which is, there is a
10 distinction between a challenge to an executive order and a
11 memorandum and a challenge to individual agencies' decisions.
12 If agencies do something that is unlawful, arbitrary and
13 capricious, is no -- and is not reasonably considered, there
14 are two possible -- there are two possible remedies for that.

15 The first, which we would say --

16 **THE COURT:** How do we know what the agencies are
17 doing?

18 **MR. BERNIE:** Well, if the --

19 **THE COURT:** Who will tell us?

20 **MR. BERNIE:** Well, if the agency does -- does any- --
21 well, for things like -- for things that actually affect
22 plaintiffs, like reductions in force, consolidations of
23 offices, anything that actually has an effect on plaintiffs,
24 those decisions will be disclosed when they're made. And when
25 they're made, plaintiffs can challenge them.

1 And indeed, plaintiffs have challenged individual
2 decisions. There was -- there was a hearing earlier this week
3 in Rhode Island by a group of states challenging certain
4 reorganizational and RIF matters at HHS.

5 My co-counsel was at a hearing earlier this week involving
6 certain RIFs at DHS.

7 There was a decision issued last night -- I can provide
8 copies of that decision to the -- to the Court and counsel --
9 involving a challenge to the -- could you just bring it --
10 involving a challenge to the Department of Education's RIFs and
11 certain reorganizational activities pursuant to -- pursuant
12 to -- pursuant in part due to the executive order.

13 I didn't -- didn't get a chance to put in a notice of
14 supplemental authority because it came in last night and I was
15 just flying in but -- in which Judge Friedman in the District
16 of D.C. declined to issue a preliminary injunction against
17 certain RIF-related matters at the Department of Education,
18 which -- and I guess I would -- I would say that this
19 illustrates two things that we think are very important in
20 determining the Court's role in this case.

21 First of all, we think Judge Friedman's decision
22 illustrates the sorts of things that a court would be doing in
23 considering an individual agency action; namely, doing what he
24 did in that case, which is looking to see if what the agency
25 did is consistent with its organic statutes and prevents the

1 agency from performing its statutorily mandated functions.

2 But beyond that, plaintiffs' theory in this case -- and
3 I think this has to be their theory because they're globally
4 challenging the executive order -- which is that the executive
5 order cannot be lawfully implemented, and that it's like the
6 executive order in *City of San Francisco v. Trump*.

7 Well, in this case, I think you have a very able and
8 experienced district judge concluding on the facts of that case
9 that plaintiffs were unlikely to show that that particular
10 implementation was lawful.

11 We don't think that this is -- this case is anything like
12 the exec- -- the limited situation like in *City of*
13 *San Francisco vs. Trump*. I could talk about that case briefly,
14 but if the Court -- the Court indicated it had some questions
15 for -- I mean, I don't want to step on any --

16 **THE COURT:** No, no. Go ahead.

17 **MR. BERNIE:** -- questions the Court had.

18 **THE COURT:** Talk about that.

19 **MR. BERNIE:** So -- I mean -- so in that case -- which
20 we think is the most directly analogous case for how courts
21 should review an executive order on an *ultra vires* theory
22 with -- consistent with law clause, like this case -- the
23 executive order had a provision purporting to withhold grants
24 to cities that could not -- that willfully refused to comply
25 with a federal statute. The Ninth Circuit held that that --

1 that that executive order was *ultra vires* and unlawful in all
2 its applications because the executive branch, as a whole, had
3 no power to add funding conditions that Congress had not
4 prescribed.

5 And if you look at that decision, and Footnote 6 in
6 particular, the Ninth Circuit made clear that there were
7 absolutely zero grants the Department had identified to which
8 this condition could be complied.

9 The court in that case declined to give effect to the
10 savings clause because giving effect to the savings clause
11 would mean that the executive order itself would have no
12 meaning.

13 And I appreciate the Court's observation at the beginning,
14 but I think this case is fundamentally different in that
15 agencies do have authority to conduct, in certain cases, RIFs,
16 including large-scale RIFs. We know that because
17 5 U.S.C. 3502 -- I think it's (d) (1) (B) -- recognizes the
18 possibility of RIFs involving significant numbers of employees.
19 OPM has codified that by regulation. They are not banned.
20 They are simply subject to slightly -- to slightly evaluated
21 notice requirements, a requirement that a state and the chief
22 executive of a city be notified.

23 So I think -- by analogy, I think the Court can issue an
24 injunction finding that this executive order is unlawful only
25 if the executive branch, as a whole, has no authority to engage

1 in large-scale RIFs, and that's -- and we just don't think
2 that -- we just don't think that's the case; they clearly do.

3 How an agency complies in particular cases, whether it --
4 whether it -- whether it's consistent with the governing
5 statutes, whether its decisions are -- are arbitrary and
6 capricious, those sorts of claims can be brought, again, in one
7 of two ways. We would say through the administrative scheme
8 prescribed in the CSRA and FSMR -- RS; but at most, in a
9 federal district court that would decide the issue based on --
10 based on the -- based on the record in that case and what the
11 agency specifically did.

12 The Court has also expressed concern about organiza- --
13 about -- about -- about the President's supposed lack of
14 authority to broadly restructure federal agencies without the
15 consent of Congress. I want to address that directly.

16 I mean, I think we may have -- you know, it's possible
17 that we may have different views about the extent of the
18 President's authority to restructure. But I don't think
19 the Court needs to reach that in this case because, again, this
20 is a global challenge to an executive order.

21 All the executive order says is for -- agencies should
22 issue a report determining whether certain components should be
23 abolished, consolidated, et cetera. Agencies may make
24 different decisions, and those decisions can be considered on
25 their merits.

1 I mean, we know that agencies have some housekeeping
2 authorities to consolidate, to eliminate components that aren't
3 statutorily required. I mean, I think examples of that are --
4 are legion.

5 I mean, just to take an example, I mean, I'm an employee
6 of the Department of Justice's Environment and Natural
7 Resources Division. I'm on detail to the Civil Division.
8 During the Biden administration, ENRD -- there was an Office of
9 Environmental Justice established in ENRD, and this
10 administration eliminated it. There's -- an Office of Tribal
11 Justice was founded within DOJ a few years earlier. Agencies
12 make decisions all the time to consolidate certain HR functions
13 at headquarters.

14 Again, there may be certain steps that an agency take that
15 there will be debates about whether it goes beyond the agency's
16 authority, and such that congressional involvement -- but
17 the -- the -- the appropriate form for that is challenges to
18 those cases.

19 I guess -- I guess the only thing I would say is that
20 before taking the step -- and I understand that the Court has
21 thought carefully about this case. Before taking the serious
22 step of globally enjoining not just -- not just an action of
23 the executive branch, but an executive order of the President,
24 it's incumbent to do that based on what the executive order
25 says, not on plaintiffs' allegations about how plaint- -- how

1 agencies are allegedly implementing it, and to do so only if
2 the executive order has no valid applications.

3 And we respectfully submit that that is -- that that is
4 simply not the -- that that is simply not the case here.

5 **THE COURT:** Why do you think in the past all those
6 presidents have requested congressional authorization to
7 reorganize the executive agencies?

8 **MR. BERNIE:** Your Honor, there -- I'm not -- I'm not
9 saying that -- I'm not saying that there might not be some
10 reorganizations down the road that do require -- that do
11 require -- I'm not conceding that they are. But, like, again,
12 the question before the Court is just whether -- from our
13 perspective, is just whether President Trump acted *ultra vires*
14 when he act- -- asked agencies to study these questions.

15 But I don't -- but to answer the Court's question --

16 **THE COURT:** When he asked agencies to study these
17 questions? That's how you view this order?

18 **MR. BERNIE:** What's that?

19 **THE COURT:** You view this order as a request that
20 agencies study the question?

21 **MR. BERNIE:** Well, no. I mean, I -- not just that. I
22 mean, well, the report -- the executive order just -- just --
23 just asked the agencies to prepare a report determining whether
24 any of their components or the agency itself should be
25 abolished, consolidated, et cetera.

1 If the agency issues a report and concludes that they can
2 take certain actions consistent with applicable law, then
3 I think that they can do that.

4 But the executive -- my point is simply that the executive
5 order itself, unless you think agencies -- agencies have no
6 authority to engage in any reorganizational activity
7 whatsoever, the executive order itself doesn't command action
8 inconsistent with the law.

9 And, again, we think the solution to that is -- is to
10 allow the agencies to implement the executive order and allow
11 plaintiffs to challenge implementations that they dislike
12 rather than --

13 **THE COURT:** Then they could find out what those
14 implementations are after they're implemented. That's the
15 plan?

16 **MR. BERNIE:** Well, I think -- I think that --
17 respectfully, Your Honor, I think that's -- that's the norm in
18 every -- in almost every -- almost -- again, I'm not conceding
19 that -- we have our channeling arguments. I'm not conceding
20 there be APA.

21 But in almost every -- most of the time when an agency
22 does something, it's -- whether it's an APA case or otherwise,
23 it's a challenge to an agency -- to something the agency has
24 done, not -- not a challenge to something the agency is
25 thinking about doing or plans to do, subject to potentially

1 superseding plans in the future.

2 But, again, I mean, we -- as -- so we do think that the
3 executive order here is lawful. And just with -- with respect
4 to --

5 **THE COURT:** Well, I just would note it's entitled
6 "Implementing The President's 'Department of Government
7 Efficiency' Workforce Optimization Initiative"; right?

8 That's the name of it, "Implementing."

9 **MR. BERNIE:** Right.

10 **THE COURT:** It's not advising about how you might
11 consider.

12 **MR. BERNIE:** Oh, no, no, no. Again, to be clear,
13 like, the executive order requires implementation. We've never
14 said that it's not -- we've never said that it's not mandatory.

15 But the question of whether it's mandatory is separate
16 from the question of what it mandates. And it gives agencies
17 broad authority to determine what their legal authority is and
18 pursue it consistent with the President's policy preferences.

19 And we think, in terms of the President's authority, if an
20 agency has lawful authority to do something, we think it's a
21 basic -- basic in the structure of Article II that the
22 President has authority to -- to direct the agencies -- as long
23 as the President's directives don't direct the agency to
24 violate the law, direct the agencies how to exercise their
25 statutory authorities.

1 We think that's clear from a number of -- clear from the
2 structure of the Constitution, but also the D.C. Circuit's
3 decision in the *Alba* case, which we cite, in which the
4 Ninth Circuit distinguished in -- distinguished in the *City of*
5 *San Francisco* case but didn't disagree with. It's not binding
6 on this Court, we recognize, but it's a unanimous decision by
7 an ideologically diverse panel in that case.

8 And what you had in that case was a presidential condition
9 requiring contractors and bidders -- prohibiting them from
10 either requiring or -- or prohibiting entry into certain labor
11 agreements. And the Court said two things which we think are
12 directly relevant in this case.

13 First of all, the Court said that the Pres- -- that if
14 agencies had authority to impose a requirement like this, the
15 President has -- had authority, Article II, to direct the
16 agency on the performance of their lawful duties.

17 And also the Court acknowledged that there might be
18 certain agency-specific statutes that prohibited -- that
19 prohibited following the President's directive. And it said
20 that didn't mean that implementation of the executive order
21 should be enjoined. It simply means, because there was a
22 consistent with law clause in that case, like there is here,
23 that the executive order directed the agencies to follow the
24 law in that case, as it does here.

25 I'm happy to -- so -- and in terms of the workforce

1 memorandum, we continue to just think that -- first of all, we
2 just don't think it's agency action. We think that the
3 ARRPs -- I -- the Court said it didn't really influence your
4 thinking about the case, and also don't really want to
5 address -- address the details of that in open session.

6 But as we've said in public filings, we think the ARRPs
7 themselves are pre-decisional and deliberative because --
8 because they don't bind the agency to anything.

9 But the workforce memorandum is a step beyond even -- even
10 that, in that all it does is tell the agency what they
11 should -- topics they should include in the ARRPs.

12 And I guess the one thing I would say about -- if
13 the Court is still inclined, at the conclusion of this hearing,
14 to follow its initial inclination on injunctive relief, is --
15 is any injunction should be limited to what plaintiffs are
16 actually complain- -- complaining about and what the Court
17 finds is problematic.

18 So what plaintiffs are really complaining about is that
19 the review -- what they see as the review and approval
20 requirement takes away agencies' discretion to decide for
21 themselves.

22 As I just said, I don't think that's how this works. But,
23 at most, we think that -- we think there's nothing wrong with
24 OPM and OMB initiating this process which is calling for the
25 ARRPs to include these topics.

1 So if the Court is still inclined to issue injunctive
2 relief, I guess I would -- I would ask the Court to consider
3 whether -- the only injunction we think, at most, would be
4 necessary would be an injunction directing that OPM and OMB
5 can't condition an agency's implementation of ARRPs on their
6 approval.

7 I mean, I'm not -- we don't think that injunction is --
8 would be appropriate either. I'm not necessarily suggesting my
9 OPM and OMB clients would be -- would be happy with that. But,
10 I mean, it would certainly -- it's certainly -- I don't see any
11 plausible argument that -- that outside that review and
12 approval requirement, there's anything problematic about OMB
13 and OPM setting forth guidance -- and we certainly don't think
14 there's anything wrong with the substance of this guidance
15 which doesn't tell agencies what to decide; it simply tells
16 agencies what to include and -- and consistently tells them to
17 make decisions consistent with their own statutory authorities.

18 And then -- so I know the Court originally called me up to
19 ask questions. Were there any other --

20 **THE COURT:** No, that's fine.

21 **MR. BERNIE:** Okay.

22 **THE COURT:** That's fine. Thank you very much.

23 **MR. BERNIE:** Okay. Thank you very much. Appreciate
24 it.

25 **THE COURT:** Ms. Leonard?

1 **MS. LEONARD:** Thank you, Your Honor. I'm going to
2 take the questions about the merits issues that you were
3 discussing with opposing counsel first, and then my colleague
4 Ms. Leyton is going to take some of the questions about that --
5 where you started, regarding the scope of the injunction issues.

6 We have fundamental differences with what government
7 counsel is presenting with respect to what this executive order
8 says and what the OMB/OPM memorandum implementing that
9 executive order says and what they do with respect to the
10 agencies.

11 And our argument, unlike counsel's, is derived directly
12 from the language of the orders and the record evidence before
13 the Court of what is happening.

14 We don't live in the hypothetical world that the
15 government counsel wants to litigate this case based on where
16 OPM is just -- and OMB are just issuing a request for planning
17 documents that may be implemented into the future and not
18 directing what is happening at these agencies.

19 The real world that we live in, the record evidence is
20 before this Court that OMB and OPM are making the decisions
21 here. They are saying what to cut, when to cut, where to cut.
22 And all they're asking the agencies to do is to come forward
23 with a plan for how to implement the categorical directives
24 that they've been given by the President and OMB and OPM.

25 One particular point with respect to the language of the

1 memorandum, counsel indicated that, once again, in this
2 hypothetical world that they appear to be living in, that OMB
3 and OPM are not making any decisions. The language on page 6
4 of the memorandum that I believe Your Honor was referring to
5 says [as read]:

6 "Finally, agencies or components that provide
7 direct services to citizens shall not implement any
8 proposed ARRPs until OMB and OPM certify that the
9 plans will have a positive effect on the delivery of
10 services."

11 How is that not approval, Your Honor? They cannot
12 implement until we say that you can implement. And that is
13 exactly what they're doing. They're not just doing it for the
14 direct services, though the record is very clear that that is
15 what they're doing. They're doing it across the board.

16 And the evidence before the Court shows that OMB and OPM,
17 when the agencies are coming forward and saying "Our functions
18 are statutorily required" -- NSF, AmeriCorps, others -- "Our
19 functions are statutorily required" -- EPA -- "We want to keep
20 them. Do not do this to us," OMB and OPM are saying: Cut and
21 cut now.

22 Your Honor was absolutely correct in the TRO analysis that
23 the President and OMB/OPM and DOGE lack any authority, whether
24 under the Constitution or any statute, to order a large-scale
25 reorganization like this. But there's a further unlawfulness

1 that I want to specifically address. The manner in which the
2 agencies are being directed to act, not just the fact of the
3 reorganization but the manner in which that that reorganization
4 is being ordered to take place is a key to the unlawfulness of
5 this order and the relief that plaintiffs are requesting.

6 And this is why: There are two specific things in the
7 executive order and the OMB/OPM memorandum that provide
8 categorical direction as to how to implement the President's
9 orders, and I will identify both of them.

10 But if -- but as a sidenote, Your Honor, if there's any
11 doubt as to what the executive order means, I think all you
12 have to do is look at what OMB and OPM say it means in the
13 memorandum to clarify that doubt.

14 I don't think there's any doubt that when the President
15 says "Prioritize in large-scale RIFs to eliminate any functions
16 or people that are not required by statute" -- when he says
17 "prioritize" he means "do it."

18 And OMB and OPM put that into effect through their
19 memorandum saying -- counsel says it only says "should." Well,
20 "You should include this and bring it to us, and we have a
21 review and approval power, and we'll reject it if you don't do
22 it" means it's mandatory, Your Honor.

23 So the two things that agencies are categorically required
24 to do: Number 1, eliminate any programs and offices that the
25 President and his agents say to eliminate.

1 AmeriCorps, gone. The Office of Federal Contract
2 Compliance and Labor, gone. The Office of Research and
3 Development at EPA, gone.

4 That's Number 1. That is blatantly outside of authority.
5 That does not rely on the agencies' own discretion and
6 authority as they're trying to piggyback into the Article II
7 power. That is blatantly outside of authority.

8 So that's Number 1. Categorical instruction: You must do
9 this and then RIF anyone who is in those offices.

10 But Number 2 is equally important. Number 2 is the
11 fundamental instruction that agencies must eliminate all
12 non-mandatory functions and the people who perform them.

13 Over and over I just heard opposing counsel say, "If it's
14 not required by statute" -- required -- "then agencies have the
15 authority to cut it." Well, agencies do things that are
16 authorized by statutes but not specifically required every day,
17 Your Honor, and those are things that are crucial to the proper
18 functioning of federal agencies.

19 The Government -- the President's order here mandates --
20 and through the OPM memorandum, it's very clear -- mandates
21 cutting anything that is not statutorily required. It's
22 page -- the best crystallization of this is on page 2 of the
23 OMB memorandum where they talk about the principles to inform
24 the ARRPs. They say [as read]:

25 "We want you to impose a significant reduction

1 in the number of full-time equivalent positions by
2 eliminating positions that are not required."

3 Then right below that [as read] :

4 "Pursuant to the President's direction, agencies
5 should focus on the maximum elimination of functions
6 that are not statutorily mandated."

7 This is the categorical directive that is outside of the
8 President/OMB/OPM's/DOGE authority and also is profoundly
9 arbitrary and capricious for OMB and OPM to require every
10 agency to engage in. It is profoundly arbitrary and capricious
11 if the agencies did it on their own.

12 You cannot ignore what it takes for an agency to be a
13 properly functioning agency in all of the ways that are
14 authorized by Congress and strip to the bone, just to leave
15 behind the functions that Congress specifically says are
16 required. That's one of the most fundamental problems with
17 this executive order.

18 And agencies engage, as I said, in non-statutory mandated
19 functions all the time. Statutes don't often mention the
20 people who clean the bathrooms, Your Honor, or --

21 **THE COURT:** But don't the agencies have the authority
22 to cut back on those non-mandated functions if they want to?

23 **MS. LEONARD:** So if they engaged in reasoned
24 decision-making and decided themselves that that was necessary,
25 sure, they could do that. But that's not what's happened here.

1 They've been told: Cut all of them across the board.

2 They have not been allowed -- no one has made the decision
3 with respect to the agencies' needs and functions as to whether
4 that decision is necessary. They've been told to cut all of
5 them, Your Honor. They are sacrificing agency function at the
6 altar of workforce reduction.

7 The purpose of this is to cut, cut, cut, not to consider
8 what agency function is really necessary. That's the
9 fundamental problem with this, Your Honor.

10 It is not within the President's authority to order
11 agencies to abuse their discretion. It is not within OPM or
12 OMB's authority to order agencies to abuse their discretion.
13 And that is exactly what they have done here.

14 The agencies cannot function properly without the people
15 who fix the roof, who repair the cars, who file the paperwork,
16 who do the trainings, who -- the list goes on and on and on of
17 things that are not specifically mandated.

18 And we believe that what they are interpreting -- what OMB
19 and OPM is -- and DOGE is interpreting "statutorily required"
20 to mean is specifically mentioned by statute. Agencies do so
21 much more than that and need so much more than that to be
22 functioning, and they have ignored that and ordered them
23 across-the-board, categorical: Eliminate all of those
24 positions.

25 And this is very akin to the funding freeze case, *New York*

1 v. *Trump*, out of the First Circuit, where the Court -- the
2 First Circuit said it matters not that there could have been
3 under -- you know, any agency, if it had taken the time, could
4 have looked at each of the grants and decided to put a pause
5 for certain reasons. What this is, is a categorical directive
6 that requires the agencies to defy that.

7 And how do we know that? Agencies are not permitted here,
8 as counsel has suggested by these mandatory orders, to say no.
9 They're not permitted to make the determination of whether
10 eliminating those, what they call, discretionary functions is
11 necessary for the -- for all the reasons that -- that agencies
12 know to look at their statutes and what Congress has expected
13 of them and wants of them and the proper functioning of the
14 agency under the housekeeping statute and all of that.

15 They're not permitted to make that decision. They are
16 being told: This is what you are cutting. Go figure out how.

17 And the ARRPs are the "go figure out how" to hit the
18 categorical cuts that the administration is mandating.

19 And, of course, they're complicated. These are
20 complicated, cabinet-level departments, very large, independent
21 agencies like EPA. They're struggling to put together plans to
22 achieve what OMB and OPM and DOGE are forcing them to do.

23 And when they -- as we've said and as the record reflects,
24 when they have come forward and said, "We want to keep these --
25 these positions"; the NSF, "We want to keep our scientists,

1 because what we do is important to the functioning of the
2 agency and is statutorily mandated," OMB, OPM, DOGE: No. RIF
3 them now.

4 And that's exactly what's happened, Your Honor. That
5 categorical directive of -- both parts, the cut all the offices
6 and functions that we direct, and specifically non-statutorily
7 required functions, that is outside the President,
8 OMB/OPM/DOGE's authority, and it is part and parcel of why this
9 executive order is so unlawful, in addition to what I would
10 call the top-line argument that the President is engaging in an
11 unconstitutional reorganization.

12 It's both the fact of that reorganization and how it's
13 being implemented through this executive order that is so key.

14 It's also key to the scope of relief that we are asking
15 for in the injunction aimed at the ARRPs and all the ways that
16 these plans and directives -- these categorical directives are
17 being implemented now by these agencies.

18 And as I said, my colleague will address the scope of
19 relief questions further, but I wanted to make that link
20 between that important argument and basis for saying why this
21 is so unlawful, because when you order across an agency that
22 all discretionary functioning be cut, what remains, Your Honor?
23 Is it a functioning agency? Can people do the jobs that are
24 mentioned by Congress in the specific statutes if there is no
25 one to do the paperwork, make the travel arrangements, all the

1 other -- all the other functions?

2 And I'm not trying to say that it's only administrative
3 jobs that are not mentioned specifically by statute; it's so
4 much more than that. But I think that this administration
5 discounts the value of that work and the need for that work to
6 have a fully functioning agency, and I think that that is
7 really, really profoundly problematic, Your Honor.

8 **THE COURT:** And you think that the declarations and
9 other materials that you've supported -- that you've provided
10 support what you just said as a matter of fact?

11 **MS. LEONARD:** I believe that they do, Your Honor, yes.

12 And I think that you can look at the face of the executive
13 order as well and the OMB memorandum and see that categorical
14 directive, and then supported by the evidence that we've shown
15 which links it to the harm that -- that -- that those actions
16 will have across the entire country. That is what we have
17 attempted to do. The President cannot remove the agency's
18 ability to make that assessment.

19 And now, if the President had stepped in and actually made
20 that assessment himself for any particular agency -- okay,
21 these are all the agencies' needs -- we might be having a
22 different conversation. But what he did was impose a
23 government-wide, categorical directive: Eliminate all of those
24 functions later, and rearrange the pieces of the agencies
25 afterwards to fit.

1 That is unlawful, Your Honor.

2 Briefly, on the *City and County of San Francisco*, just to
3 respond -- I think we've addressed this clearly in our
4 papers -- but what the Ninth Circuit said there is that a
5 savings clause cannot -- it's not an escape clause to get out
6 from under the specific language and directives of the
7 executive order.

8 And what I've just described is the mandatory language in
9 the executive order: Prioritize the offices and programs we're
10 going to cut and all non-statutorily mandated functions going
11 down, in the executive order, to government shutdown levels of
12 staffing.

13 There is nothing more arbitrary and capricious than that,
14 Your Honor. But that is the language of the executive order.
15 OMB and -- OMB and OPM confirm it in their directive. And the
16 savings clause of, "Oh, but also go comply with the law," if
17 those things are in direct tension, which they are, then the
18 savings clause doesn't save anything.

19 Final agency action. It is absolutely not the case that
20 this Court, under the APA or otherwise, needs to wait until
21 every single action implementing an unlawful directive has
22 happened and made public in order to act to stop it. That is
23 profoundly wrong.

24 The APA has never meant that, Your Honor. The APA looks
25 at who's making the decision. And we have the decision-makers

1 here, Your Honor. We know who's making the decision under
2 these -- this executive order and the memorandum because
3 they've said it in the document itself. OMB/OPM, they're
4 making the decisions about the contents of the plan and the
5 timing.

6 We shouldn't forget the timelines for the actions
7 implementing are -- a major part of the ARRP. That's in the
8 memorandum. It says: Give us the timeline. What actions are
9 you taking to hit the President's directives and when? And
10 we'll approve that too.

11 That's what's happening here. The decisions have been
12 made at the level of approving the ARRPs.

13 What the Government said to the Supreme Court when they
14 went up on the stay from the TRO is that Your Honor's TRO
15 stopped 40 RIFs at 17 agencies. Those had been approved,
16 Your Honor.

17 There cannot be a shred of doubt that there are actual
18 concrete actions under the ARRPs that go well beyond RIFs.
19 Those ARRPs go well beyond RIFs. They're hitting
20 reorganization and they're hitting reduction through specific
21 concrete actions that have been approved. They're not
22 pre-decisional. And that is absolutely something, under the
23 APA and the equitable authority of this Court, that this Court
24 can enjoin.

25 With that, unless Your Honor has any further questions

1 about the merits, I will happily turn things over to my
2 colleague Ms. Leyton.

3 **THE COURT:** All right. That's fine. And I wanted to
4 ask -- I'll hear from you in a second.

5 But, Mr. Bernie, have any federal employees been
6 terminated by RIFs implemented under this executive order?

7 **MR. BERNIE:** Can I have a second, Your Honor?

8 **THE COURT:** Yeah.

9 (Co-counsel confer off the record.)

10 **MR. BERNIE:** So I think -- I think, Your Honor, that
11 there have -- I mean, there have certainly been -- there have
12 certainly been removals from service that are outside of this
13 executive order, like the probationary litigation before
14 Judge Alsup.

15 I don't think -- I'm not positive, but I don't think that
16 any reduction -- I mean, RIF notices were issued, I think, but
17 I don't think that any reductions in force were finalized
18 before the Court's TRO.

19 Typically, there's a 60-day notice period, which can be --
20 which can be reduced to 30 days with OPM's permission under
21 certain circumstances. I could -- I could check into that.
22 But I don't think any RIFs pursuant to this executive order
23 have been -- were -- were completed before the TRO, if
24 that's --

25 **THE COURT:** Thank you.

1 **MR. BERNIE:** Yeah.

2 **THE COURT:** Ms. Leyton.

3 **MS. LEYTON:** Thank you, Your Honor.

4 I'd like to begin by addressing the question that
5 Your Honor raised at the beginning of this hearing which was
6 the appropriate question about what this Court would do if it
7 were to limit the injunction to the named plaintiffs.

8 As Your Honor well knows, courts are not to issue vague
9 injunctions where the defendant does not know how to comply,
10 and the defendant has already raised some concern about their
11 compliance questions.

12 And there is no possible way that this injunction could be
13 limited to only the plaintiffs. And there's a reason why
14 the Government has not suggested how that could happen because
15 there is not a possible way to do that.

16 The scope of injunctive relief is dictated by the nature
17 and extent of the violation and by the nature and extent of the
18 injury to the plaintiffs. Here, both require an injunction --
19 stopping the ARRPs and the implementation of the EO and the
20 memo at the agencies where we have shown harm.

21 There is an order that is an order that applies to all of
22 these agencies, that requires the stripping down of the
23 agencies to only what this administration views as their
24 necessary statutory functions, that directs the agencies to
25 strip down to lapse-related levels when there are gaps in

1 appropriations.

2 And the directive to those -- those directives cannot be
3 remedied through pinpoint injunctive relief. These agencies
4 are interdependent entities. If this Court were to order the
5 restoration of the food inspectors for the Department of
6 Agriculture, but not to order the -- but not to order a stop to
7 the RIFs of those who are arranging the travel for those
8 individuals, those who are arranging the inspections, then the
9 harm cannot be remedied. And that is exactly why this Court
10 should order the -- the preliminary injunction that we have
11 requested.

12 I would also point out that this is the presumptive remedy
13 under the Administrative Procedures Act. It's vacatur of the
14 rule, and this circuit has held that that applies at the
15 preliminary injunctive relief stage in cases like *East Bay*
16 *Sanctuary*.

17 We've demonstrated multiple violations of the APA here.
18 And so that, in addition to the fact that it is really just
19 impossible to disentangle the harm -- and we've shown at each
20 of the 19 agencies where we have sought injunctive relief,
21 irreparable injury to plaintiffs in this case. Where we
22 haven't shown irreparable injury, we have not sought injunctive
23 relief as to that agency. And so that is relief that the
24 plaintiffs have shown entitlement to.

25 I would also point out that the Government relied on an

1 opinion by Judge Sutton. That was not an opinion of the
2 Sixth Circuit; that was a concurring opinion by Judge Sutton.
3 He did author the majority decision, but the part that
4 the Government is relying on was in his single-judge
5 concurrence.

6 In the Ninth Circuit, this circuit has made clear that
7 this Court does not need to close its eyes to the practical
8 effects of how an injunction would be implemented.

9 In cases like *East Bay Sanctuary* and *City of San Francisco*
10 *vs. Barr*, when deciding whether to geographically limit an
11 injunction, for example, the Court looks at the nature of the
12 injury to the plaintiff and whether an injunction is
13 susceptible of neat geographic boundaries.

14 Here, it is not possible to impose those neat geographic
15 boundaries, nor is it possible to impose boundaries based on
16 the particular injuries to each of the -- of the multiple
17 plaintiffs that we have demonstrated, and that's precisely why
18 the Government does not suggest a way to do so.

19 I'd also like to address the Government's alternative
20 suggested limit, which was, I believe, that the Court should
21 prevent OMB and OPM from conditioning implementation of the
22 ARRPs on their approval.

23 I'd like to just begin by saying --

24 **THE COURT:** Say that again.

25 **MS. LEYTON:** I believe that it was that the -- that

1 the alternative injunctive relief was that the agencies'
2 implementation of the ARRPs would not be conditioned on whether
3 they received OMB or OPM approval.

4 A fundamental problem with that suggestion is that OMB and
5 OPM have already approved many of these ARRPs and have already
6 rejected approval of a number of ARRPs.

7 I think this Court mentioned one of the examples. I would
8 just like to point the Court's attention to the four examples
9 that are in the record, not because defendants have disclosed
10 these but because they have been disclosed through other means.

11 We have the example of AmeriCorps in the Daly declaration,
12 which is 37-12 on the docket, that the agency did not want to
13 terminate their employees and were told that they had to.

14 We have the National Labor Relations Board, and that is
15 attached to the Chisholm declaration, Docket 36. We know that
16 the National Labor Relations Board said that they could not
17 reduce staff and that OMB sent back a memo saying, "Does not
18 meet expectations." They were told that they could not -- they
19 could not do what the agency wanted to do.

20 We have the National Science Foundation and the National
21 Endowment for the Humanities. National Endowment for the
22 Humanities is not a defendant we are seeking a TRO -- a
23 preliminary injunction from, but NSF is. And those can be
24 found in the Soriano declaration and the supplemental Soriano
25 declaration at 37-32 and 96-1.

1 The agency did not feel that it could terminate the
2 employees and engage in the RIFs that the administration
3 wanted, and they were told that they had to.

4 The other problem, of course, is that the agencies are
5 operating under an unlawful directive, the executive order.
6 And so, even aside from the OPM/OMB-required approval, they are
7 being directed to do what the President has -- has ordered,
8 which is an unlawful order for a reorganization without
9 Congressional approval.

10 We have evidence in the record that DOGE and -- that
11 the -- that DOGE both -- DOGE has people within the agencies
12 that are directing the agencies to make specific cuts, to
13 consolidate specific offices, to -- to RIF employees. And OMB
14 and OPM are telling them to do that while disclaiming that they
15 are formally approving anything, even though that is required
16 for the agencies to implement. So it would not be possible to
17 remedy the plaintiffs' injuries by imposing that more limited
18 injunction.

19 I would also just like to address the Court's questions
20 about possibly issuing a stay. As this -- this -- my colleague
21 has pointed out, the APA does not require plaintiffs to wait
22 until after a cut has been made and after the impact is felt in
23 order to pursue injunctive relief.

24 **THE COURT:** Well, what I was -- what I was thinking
25 about was, you're requesting that people who have already been

1 put on administrative leave be taken off of that and put back
2 in place to work, which, frankly, makes a lot of sense
3 because -- it doesn't make sense to have employees sitting
4 around and not working.

5 But leaving that aside, I'm concerned that there are a
6 number of requests for stay. They've not been acted on, and I
7 don't know what will happen. But for people who are being
8 ping-ponged back and forth, I feel that's very difficult for
9 them.

10 So prospective relief, which is what I granted two weeks
11 ago, would not have quite that same effect. So I was wondering
12 why you want me to grant relief to those who've already been
13 put on furlough.

14 And then, so what I was thinking was grant -- if it's a
15 matter of the time clock running, grant the relief you request,
16 but stay it so that people just don't have to be moving around
17 before they know what the final rules are going to be.

18 **MS. LEYTON:** And, Your Honor, we share the Court's
19 concern about the ping-ponging of employees and their
20 understanding of their job situation. And that is something
21 that has occurred, even aside from any injunctions, where
22 the Government has terminated or RIF'd people and then decided
23 that it actually needed those individuals and brought them
24 back. And we -- we share that concern.

25 **THE COURT:** Well, and there are statements from

1 Secretary Kennedy suggesting that that's what their plan was.

2 **MS. LEYTON:** Exactly. RIF everybody and then bring
3 20 percent back, possibly, acknowledging that that would be
4 part of what would take place through the HHS RIFs.

5 What we would ask is that if there is any stay on
6 implementation of some of the aspects of the preliminary
7 injunction, that we -- that it be limited such that we have
8 some opportunity to come back in to demonstrate ongoing harm
9 from the placement of people on administrative leave to the
10 extent that we could seek relief in -- in the future, even if
11 there were a stay on some aspects of the injunctive relief.

12 Our position is that the status quo is that those people
13 were in their jobs and not on administrative leave; but to the
14 extent that the Court is concerned about that harm, we would
15 want to be able to come in and demonstrate that their placement
16 on administrative leave is causing harm to the plaintiff cities
17 and counties, to the -- to the plaintiff organizations,
18 particularly the HHS RIFs, which occurred very immediately and
19 resulted in placement of people on administrative leave. So
20 that -- that is what we would request.

21 And the other thing that I think would be key is, we've
22 talked about what we've requested in terms of a preliminary
23 injunction is that we need very detailed compliance reports.
24 The Government has objected to any requirement that they meet
25 and confer with the plaintiffs. We believe that that is the

1 most streamlined and efficient way for us to be able to present
2 any disputes to this Court.

3 But as Your Honor knows, in response to the TRO, it was a
4 mere two-page declaration stating -- or two-page submission
5 saying: We directed our clients to comply.

6 We don't know what each agency has or has not done. We
7 have some concerns that there may have been consolidation of
8 offices or that some of the terminations of probationary
9 employees were pursuant to ARRPs, were directed by DOGE and/or
10 by OPM and OMB.

11 And the only way to be able to ensure compliance with
12 this Court's order is to make sure that the defendants are
13 submitting detailed compliance reports and that they are
14 showing any ARRPs that have been approved, as my colleague
15 argued, that we should be able to look at that so that we know
16 what is happening pursuant to these ARRPs as opposed to
17 pursuant to some other executive order or some other
18 administrative action that we have not challenged.

19 And unless Your Honor has questions...

20 **THE COURT:** No. That's good.

21 Anything else you want to add?

22 **MR. BERNIE:** Just a few points, Your Honor.

23 First of all, respectfully, I believe Ms. Leonard stressed
24 that the -- with respect to the executive order mandates --
25 mandates elimination of all statutorily required functions and

1 employees. Respectfully, that's just not what the executive
2 order says.

3 What the executive order says is that all offices that
4 perform functions not mandated by statute or other law shall be
5 prioritized in the RIFs. And that makes sense --

6 **THE COURT:** Well, it says: Agencies should focus on
7 the maximum elimination of functions that are not statutorily
8 mandated.

9 **MR. BERNIE:** So that's -- that's from the workforce --
10 that's from the workforce memorandum. And "maximum
11 elimination" doesn't mean elimination of everything.

12 It makes sense that in prioritizing certain areas for
13 RIFs, the agency is focused on non-statutory and non-essential
14 functions. It wouldn't make sense to focus on -- to focus on
15 statutorily mandated functions. But that doesn't mean that
16 every statute -- every employee that is non-essential, every
17 component that is not statutorily mandated is going to be
18 eliminated.

19 And on the same note, the reference to 2019 and shutdown
20 levels, what the -- I think it's important to understand what
21 the workforce memorandum says on this point.

22 What it says -- and this is on page 2 of the workforce
23 memorandum. What it says is that [as read] :

24 "The agencies should determine competitive areas
25 for positions not typically designated as essential

1 during a lapse in appropriations."

2 And what it says is that when making this determination,
3 they should refer to the functions in the plan submitted to OMB
4 in 2019 as the starting point for making this determination.

5 The reason it says 2019, I believe, is because in -- as
6 the Court may recall, at 2018 into 2019, there was a prolonged
7 shutdown in the federal government, so agencies had to make the
8 determination. That doesn't mean that every competitive --
9 that every competitive area that is -- that is identified as
10 non-essential, that all of the employees in those competitive
11 areas, are necessarily going to be RIF'd.

12 And I think that that extrapolation points to a
13 fundamental problem with this lawsuit, which is: Plaintiffs,
14 respectfully, are trying to have it both ways -- or,
15 respectfully, trying to do two things, but not fully doing
16 either.

17 They're try- -- they want to challenge an executive order
18 on its face, but they don't want to be constrained by the text
19 of the executive order, which is what's required.

20 They also want to challenge what agencies are doing, but
21 they don't want to develop any sort of granular assessment
22 of -- they don't want to limit their relief to individual
23 agency actions, and they don't want to make arguments or try to
24 establish that agencies are acting in violation of their
25 gov- -- of their governing statutes.

1 They have to pick one or the other, and they've chosen to
2 bring a global claim. And we think that the executive order is
3 lawful, and that's the end of it.

4 But the one thing I would say, Your Honor, is a lot of
5 opposing counsel's presentation was directed at the workforce
6 memorandum. We think the workforce memorandum is entirely
7 lawful. We take the point. We haven't submitted evidence. We
8 don't -- we don't think that what they're saying is --
9 reflects -- but -- but the point is, is even if they're right
10 about all that, we don't think there should be any injunction.

11 But at the very least, we think the agencies should be
12 allowed to implement the executive order on their own, because
13 the executive -- because all of these complaints about what OPM
14 and OMB are doing, are -- are -- are entirely -- are entirely
15 divorced from the executive order.

16 The executive order -- which has to be judged, we think,
17 on its text -- is lawful. So at the very least, agencies
18 should be allowed to implement it. And if they do something
19 that -- we don't think they will, but if they do something that
20 is contrary to law, arbitrary and capricious, that can be
21 potentially challenged either administratively or, if our
22 channeling arguments are rejected, in a district court.

23 Finally, I want to address the pre- -- the compliance
24 point with another aspect of the injunction. First of all,
25 I think counsel mentioned that the opinion I referenced was a

1 concurrence. I apologize. I didn't realize -- it's not
2 binding on the Court either way, but I apologize for that --
3 for that error. I didn't realize that.

4 We -- but a signif- -- and I understand the Court was
5 acting on a short time frame last time, but a significant
6 problem we have in the -- with the previous TRO entered by
7 the Court is specifically the -- its application to preparatory
8 steps.

9 I mean, if -- if we -- if an agency wants to take steps
10 like drafting documents, having meetings where ARRPs are
11 discussed, all of those sort of common internal agency steps
12 are at least arguably covered by the injunction. And so we
13 think if this Court is inclined to enter an injunction, it
14 should -- it should extend to specific things that affect
15 employees. I mean, we set that forth in our briefing. That
16 way, it would be clear, like what the agency can and can't do.

17 And in terms of compliance, the -- the types of things
18 they're talking about, like RIFs, consolidations, these are
19 things that -- that agencies announce or plaintiffs will be
20 aware of when they happen. And if the injunction is
21 sufficiently clear, there's no need for the very complex
22 compliance regime they're imagining.

23 I mean, I understand them to be criticizing the
24 declaration we previously submitted. I don't think it would
25 have been feasible for us to furnish 20-plus declarations under

1 that timetable telling exactly what the agencies are doing.
2 But rest assured that we have invested considerable resources
3 in complying with the previous TRO. And although we -- we
4 don't think injunctive relief should issue, we will invest --
5 we will do the same for any order that the Court issues here.

6 Finally, the Court mentioned staying any -- any
7 retrospective aspect of the preliminary injunction. If
8 the Court does -- is inclined to enter a preliminary injunction
9 of any kind, we would ask -- similar to we did at the last
10 hearing, we would ask that it be stayed pending appeal. And if
11 the Court doesn't -- isn't inclined to grant a stay pending
12 appeal, that it note, like it did in the TRO opinion, that it
13 was denying that relief.

14 I'm just -- there's been a lot -- been a lot of briefing
15 in this case, so I'm just trying to save the parties and the
16 Court from unnecessary motions practice.

17 Finally, there have, obviously, been a lot of other issues
18 in the case, channeling jurisdiction, that we've briefed and we
19 continue to adhere to. I assume the Court -- I assume that
20 the Court doesn't want to get into any of that today, but if
21 the Court has any questions --

22 **THE COURT:** I don't have questions on that.

23 **MR. BERNIE:** Okay. Or anything else. Okay.

24 All right. Well, we -- we certainly adhere to our
25 previous arguments, but I don't think -- and our voluminous

1 briefing, but we don't have -- I don't think we have anything
2 else. So, thank you.

3 **THE COURT:** Okay. Thank you.

4 Anything else?

5 **MS. LEONARD:** To the extent that opposing counsel for
6 the Government and all of the agency defendants before
7 this Court which he represents is suggesting what agencies
8 could be doing to implement this executive order, I
9 respectfully submit, Your Honor, that the defendants know
10 exactly what they are doing, and they are refusing to put it
11 before the Court.

12 There are actions with respect to -- the ARRPs Phase 1 and
13 Phase 2 have been prepared. They've been submitted to OMB and
14 OPM. We believe that they have been approved or rejected
15 according to the process that they have set up, including, as
16 my colleague mentioned, meets expectations or doesn't,
17 expectations of OMB and OPM and DOGE and the President to
18 implement the categorical directives they've been given.

19 And make no mistake, they are categorical, Your Honor.
20 When you say "You should do this," and then the hammer is
21 enforcement by OMB and OPM, that is a categorical directive,
22 Your Honor.

23 And they've taken the decision-making away from the
24 agencies. And they want to suggest, knowing very well what the
25 agencies are doing, that they could potentially be doing

1 something other than what the President has told them to do.
2 And that is just not an appropriate representation for counsel
3 for these agency defendants to be making when they refuse to
4 talk about the facts. There are facts. They just refuse to
5 put them before the Court.

6 I think that's how -- that is all I would like to say in
7 response to that.

8 Thank you very much, Your Honor.

9 **THE COURT:** All right. Thank you. Thank you.
10 All. The matter is submitted.

11 We're adjourned.

12 **THE COURTROOM DEPUTY:** That concludes our calendar.

13 (Proceedings adjourned at 11:57 a.m.)

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2 **CERTIFICATE OF REPORTER**

3 I certify that the foregoing is a correct transcript
4 from the record of proceedings in the above-entitled matter.

5
6 DATE: Friday, May 23, 2025
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9
10 Ana Dub
11 _____
12 Ana Dub, RDR, RMR, CRR, CCRR, CRG, CCG
13 CSR No. 7445, Official United States Reporter
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